

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN DEL TORO,

Plaintiff,

v.

VASUKI DARAM, et al.,

Defendants.

No. 2:22-cv-0725 DJC AC P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Currently before the court are the parties' cross-motions for summary judgment. ECF Nos. 52, 57.

I. Procedural History

Upon screening the first amended complaint, the court found that plaintiff stated claims for deliberate indifference against defendant Daram and for negligence against defendants Daram and Schultz.<sup>1</sup> ECF No. 9. Defendant Schultz was later dismissed for failure to effect timely service. ECF No. 62. Defendant Daram moved to partially dismiss the first amended complaint (ECF No. 33), in response to which plaintiff voluntarily dismissed his request for punitive damages for the professional negligence claim and damages claim against Daram in her official

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<sup>1</sup> Schultz was initially identified as "Antwong" in the complaint, but plaintiff later stated that defendant's correct name was Schultz and Schultz was substituted for Antwong. ECF No. 25.

1 capacity (ECF Nos. 35, 37). After the close of discovery, Daram filed a motion for summary  
2 judgment. ECF No. 52. Plaintiff filed a combined opposition and cross-motion for summary  
3 judgment (ECF No. 57), to which defendant has responded (ECF No. 61).

#### 4 II. Plaintiff's Allegations

5 Plaintiff alleges that he injured his right, middle finger on August 30, 2021, and upon  
6 seeking medical attention was sent for x-rays the same day. ECF No. 8 at 6. Daram received  
7 these results, which were interpreted by the radiologist as normal. Id. Daram saw plaintiff  
8 multiple times between September 1 and October 25, 2021, but failed to provide any treatment  
9 despite plaintiff's finger being very swollen and painful. Id. at 6-8.

10 On October 20, 2021, plaintiff saw a hand surgeon who viewed the August 30 x-ray and  
11 diagnosed a closed fracture dislocation. Id. at 8. On October 25, 2021, Daram saw plaintiff for a  
12 follow up to his appointment with the surgeon and finally provided treatment by issuing an urgent  
13 referral for hand surgery and a morphine prescription for pain. Id. On November 5, 2021,  
14 plaintiff had hand surgery and was told that because of the delay in getting surgery, he could lose  
15 mobility in his right finger. Id. Plaintiff asserts that he has suffered permanent damage to his  
16 finger in the form of extremely limited range of motion, continued pain, and deformation. Id.  
17 Plaintiff alleges timely compliance with California's Government Claims Act. Id. at 6, 9.

#### 18 III. Plaintiff's Motion for Summary Judgment

19 As part of his opposition to defendant's motion for summary judgment, plaintiff has also  
20 moved for summary judgment. ECF No. 57 at 7-8. However, the motion is not accompanied by  
21 a separate statement of undisputed facts and the factual assertions made within the motion do not  
22 cite to particular portions of the record for support. See L.R. 260(a) (requiring a separate  
23 statement of facts, each supported by a citation to the record); Fed. R. Civ. P. 56(c)(1)(A)  
24 (requiring assertion that fact cannot be genuinely disputed be supported by citation to the record).  
25 As a result, plaintiff's arguments are unsupported and he has not provided sufficient evidence to  
26 demonstrate that Daram's conduct constituted deliberate indifference or negligence. Plaintiff has  
27 therefore failed to "come forward with evidence which would entitle [him] to a directed verdict if  
28 the evidence went uncontroverted at trial." Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987

(9th Cir. 2006) (citation omitted). For these reasons, plaintiff's motion for summary judgment should be denied. However, given plaintiff's pro se status, the content of the motion will be considered as part of plaintiff's opposition to defendants' motion for summary judgment.

#### IV. Defendant's Motion for Summary Judgment

##### A. Defendant's Arguments

Defendant moves for summary judgment on plaintiff's Eighth Amendment claim on the grounds that she was not deliberately indifferent to plaintiff's medical needs and alternatively because she is entitled to qualified immunity. ECF No. 52 at 13-19, 21-22. Defendant also argues she is not liable under plaintiff's general negligence theory. *Id.* at 19-20.

##### B. Plaintiff's Response

At the outset, the court notes that plaintiff has failed to comply with Federal Rule of Civil Procedure 56(c)(1)(A), which requires that "[a] party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record." Plaintiff has also failed to file a separate document in response to defendants' statement of undisputed facts that identifies which facts are admitted and which are disputed, as required by Local Rule 260(b).

"Pro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citation omitted), overruled on other grounds, *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc). However, it is well-established that district courts are to "construe liberally motion papers and pleadings filed by *pro se* inmates and should avoid applying summary judgment rules strictly." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). The unrepresented prisoner's choice to proceed without counsel "is less than voluntary" and they are subject to "the handicaps . . . detention necessarily imposes upon a litigant," such as "limited access to legal materials" as well as "sources of proof." *Jacobsen v. Filler*, 790 F.2d 1362, 1364 n.4 (9th Cir. 1986) (alteration in original) (citations and internal quotation marks omitted). Inmate litigants, therefore, should not be held to a standard of "strict literalness" with respect to the requirements of the summary judgment rule. *Id.* (citation omitted).

1 Accordingly, the court considers the record before it in its entirety despite plaintiff's  
2 failure to be in strict compliance with the applicable rules. However, only those assertions in the  
3 opposition which have evidentiary support in the record will be considered. Plaintiff opposes  
4 defendant's motion for summary judgment and realleges that defendant acted with deliberate  
5 indifference to his serious medical needs because she failed to timely treat his injuries, causing  
6 plaintiff to suffer harm. ECF No. 57 at 1-6. He also argues that defendant is not entitled to  
7 qualified immunity. Id. at 6.

8 C. Legal Standards for Summary Judgment

9 Summary judgment is appropriate when the moving party "shows that there is no genuine  
10 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.  
11 Civ. P. 56(a). Under summary judgment practice, "[t]he moving party initially bears the burden  
12 of proving the absence of a genuine issue of material fact." In re Oracle Corp. Sec. Litig., 627  
13 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The  
14 moving party may accomplish this by "citing to particular parts of materials in the record,  
15 including depositions, documents, electronically stored information, affidavits or declarations,  
16 stipulations (including those made for purposes of the motion only), admissions, interrogatory  
17 answers, or other materials" or by showing that such materials "do not establish the absence or  
18 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to  
19 support the fact." Fed. R. Civ. P. 56(c)(1).

20 "Where the non-moving party bears the burden of proof at trial, the moving party need  
21 only prove that there is an absence of evidence to support the non-moving party's case." Oracle  
22 Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B).  
23 Indeed, summary judgment should be entered, "after adequate time for discovery and upon  
24 motion, against a party who fails to make a showing sufficient to establish the existence of an  
25 element essential to that party's case, and on which that party will bear the burden of proof at  
26 trial." Celotex, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element  
27 of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. In such  
28 a circumstance, summary judgment should "be granted so long as whatever is before the district

1 court demonstrates that the standard for the entry of summary judgment, as set forth in Rule  
2 56(c), is satisfied.” Id.

3 If the moving party meets its initial responsibility, the burden then shifts to the opposing  
4 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.  
5 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the  
6 existence of this factual dispute, the opposing party may not rely upon the allegations or denials  
7 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or  
8 admissible discovery material, in support of its contention that the dispute exists. See Fed. R.  
9 Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a  
10 fact “that might affect the outcome of the suit under the governing law,” and that the dispute is  
11 genuine, i.e., “the evidence is such that a reasonable jury could return a verdict for the nonmoving  
12 party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

13 In the endeavor to establish the existence of a factual dispute, the opposing party need not  
14 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual  
15 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at  
16 trial.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987)  
17 (quoting First Nat’l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968). Thus, the  
18 “purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see  
19 whether there is a genuine need for trial.” Matsushita, 475 U.S. at 587 (citation and internal  
20 quotation marks omitted).

21 “In evaluating the evidence to determine whether there is a genuine issue of fact, [the  
22 court] draw[s] all inferences supported by the evidence in favor of the non-moving party.” Walls  
23 v. Cent. Contra Costa Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the  
24 opposing party’s obligation to produce a factual predicate from which the inference may be  
25 drawn. See Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to  
26 demonstrate a genuine issue, the opposing party “must do more than simply show that there is  
27 some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586 (citations  
28 omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the

1 non-moving party, there is no ‘genuine issue for trial.’” Id. at 587 (quoting First Nat’l Bank, 391  
2 U.S. at 289).

3 Defendants simultaneously served plaintiff with notice of the requirements for opposing a  
4 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure along with their motion for  
5 summary judgment. ECF No. 52-27; see Klinge v. Eikenberry, 849 F.2d 409, 411 (9th Cir.  
6 1988) (pro se prisoners must be provided with notice of the requirements for summary judgment);  
7 Rand v. Rowland, 154 F.3d 952, 960 (9th Cir. 1998) (en banc) (movant may provide notice).

#### 8 D. Undisputed Material Facts

9 Plaintiff did not separately and individually respond to defendant’s statement of  
10 undisputed facts and the facts are therefore deemed undisputed except as otherwise discussed.

11 At all times relevant to the complaint, plaintiff was an inmate at Mule Creek State Prison  
12 and defendant was employed there as a doctor of internal medicine and served as plaintiff’s  
13 primary care physician. Defendant’s Statement of Undisputed Facts (DSUF) (ECF No. 52) ¶¶ 1-  
14 3.

15 On August 30, 2021, Plaintiff suffered an injury to his right middle finger. DSUF ¶ 4;  
16 ECF No. 57 at 2. That same day, plaintiff was examined by a registered nurse who noted  
17 plaintiff’s finger appeared to be swollen with minimal redness, tender to touch, unable to move,  
18 and causing pain. DSUF ¶ 5. An x-ray of plaintiff’s right middle finger was ordered and  
19 conducted that day. DSUF ¶ 6. Dr. Schultz reviewed the x-ray and issued a radiology report that  
20 showed a fracture deformity of the third middle phalanx which appeared old, but no new, acute  
21 fracture. DSUF ¶ 7. The report also recommended a follow-up x-ray in ten to fourteen days if  
22 there was a strong suspicion of radiographic occult fracture.<sup>2</sup> Id.

23 Plaintiff asserts that defendant examined him on September 1, 2021, but provided no  
24 treatment even though his finger was “extremely swollen, turning black, and he was in  
25 excruciating pain.” ECF No. 8 at 7; ECF No. 57 at 2.

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26 <sup>2</sup> An “occult fracture” is a fracture that “does not appear well on an X-ray.” Possible Occult  
27 Fracture, Cedars Sinai, [https://www.cedars-sinai.org/health-library/diseases-and-](https://www.cedars-sinai.org/health-library/diseases-and-conditions/p/possible-occult-fracture.html)  
28 [conditions/p/possible-occult-fracture.html](https://www.cedars-sinai.org/health-library/diseases-and-conditions/p/possible-occult-fracture.html) [<https://perma.cc/9HYH-P8RV>] (last visited September 14, 2025).

1 On September 10, 2021, defendant examined plaintiff, noting plaintiff's finger was still  
2 swollen and painful. DSUF ¶ 8. Defendant ordered another x-ray for further analysis, as well as  
3 a large splint, an Ace wrap, and ice for plaintiff's injured finger. DSUF ¶¶ 9-10; ECF No. 57 at 2.  
4 Defendant also advised plaintiff to take nonsteroidal anti-inflammatory drugs (NSAIDs) to assist  
5 with any pain and swelling.<sup>3</sup> DSUF ¶ 10. Plaintiff's medical records indicate that at that time, he  
6 already had an active keep on person prescription for one 600mg tablet of ibuprofen to be taken  
7 three times a day on an as needed basis. ECF No. 52-5 at 3.

8 On September 17, 2021, another set of x-rays were taken and a new radiology report was  
9 issued which also showed no new fracture or dislocation of plaintiff's finger. DSUF ¶ 11.  
10 Defendant examined plaintiff's injured finger again and also analyzed the radiology reports.  
11 DSUF ¶ 12. She noted that the finger was still very swollen with no range of motion<sup>4</sup> and was  
12 painful with palpation, that plaintiff indicated he has suffered previous damage to that finger, and  
13 that there was no showing of a new fracture or dislocation. ECF No. 8 at 7; ECF No. 52-8 at 2;  
14 ECF No. 52-9 at 2; ECF No. 57 at 2. Defendant referred plaintiff to a hand surgeon for further  
15 evaluation and possible surgery on a medium priority basis. DSUF ¶ 14; ECF No. 52-9 at 2; ECF  
16 No. 57 at 2.

17 Plaintiff asserts that a registered nurse evaluated his finger on September 24, 2021, and  
18 found it to be swollen and that he was in extreme pain. ECF No. 8 at 7. He states that the nurse  
19 consulted with defendant but offers no information regarding the outcome of the consult. Id.

20 On October 8, 2021, defendant examined plaintiff's finger again due to continued pain  
21 and informed plaintiff that although the referral to the orthopedic surgeon was still pending, she  
22 would call the specialist to see if an earlier appointment was available. DSUF ¶ 15. She noted  
23 that plaintiff's finger was "still swollen and painful." ECF No. 52-10 at 2.

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24 <sup>3</sup> Plaintiff admits that defendant recommended pain medication but argues that she did not  
25 prescribe anything, leaving him without medical support or relief from pain. ECF No. 57 at 2-3.  
26 However, DSUF ¶ 10 does not state that defendant prescribed him medication so plaintiff's  
27 statements do not create a dispute and DSUF ¶ 10 is therefore deemed undisputed.

28 <sup>4</sup> Defendant's notes state "normal range of motion" but the request for hand surgery evaluation  
states "no range of motion." ECF No. 52-8 at 2; ECF No. 52-9 at 2. The court assumes that the  
notation of "no range of motion" is correct.

1 On October 20, 2021, plaintiff was examined by Dr. Dowback, an orthopedist at San  
2 Joaquin General Hospital, who ordered more x-rays for analysis. DSUF ¶ 16; ECF No. 57 at 2.  
3 Dowback's evaluation showed a closed fracture dislocation of the proximal interphalangeal joint  
4 of plaintiff's right middle finger. DSUF ¶ 17. Dowback ordered additional blood tests and an  
5 electrocardiogram and included instructions to "[p]lan surgery on specific date." *Id.*; ECF No.  
6 52-11 at 2-3.

7 On October 25, 2021, defendant re-examined plaintiff and issued an urgent referral for  
8 surgery on plaintiff's right middle finger. DSUF ¶ 18; ECF No. 57 at 3. She also ordered the  
9 blood tests and EKG requested by Dowback. DSUF ¶ 19. During the exam, plaintiff expressed  
10 continued pain and inability to flex or extend his finger and stated that he could not take the  
11 advised NSAID medication<sup>5</sup> because it caused a rash and constipation. DSUF ¶ 21; ECF No. 52-  
12 12 at 2; ECF No. 57 at 3. Plaintiff was prescribed morphine and informed of the possibility that  
13 he could break out in a rash since he had a similar reaction to codeine. DSUF ¶ 21; ECF No. 52-  
14 12 at 2; ECF No. 8 at 8.

15 Defendant ceased her duties as plaintiff's primary care physician on or about November 1,  
16 2021. DSUF ¶ 22. There is no indication from either party that defendant was involved in the  
17 treatment of plaintiff's finger after this date.

18 On November 5, 2021, plaintiff underwent open reduction and internal fixation surgery by  
19 Dowback. DSUF ¶ 23; ECF No. 57 at 3. On November 24, 2024, plaintiff saw Dowback for a  
20 follow-up appointment which showed that his right middle finger was well aligned with a range  
21 of motion in his finger joints, no sensory deprivation, and the sutures were correctly in place.  
22 DSUF ¶ 25. Plaintiff received physical therapy to improve his finger's range of motion and has  
23 twice declined evaluation for further surgical intervention to address his mobility limitation.

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24  
25 <sup>5</sup> Both DSUF ¶ 21 and plaintiff's opposition state that plaintiff suffered a rash and constipation  
26 from taking NSAIDs. DSUF ¶ 21; ECF No. 57 at 3. However, plaintiff's medical records  
27 indicate that he reported the symptoms in relation to taking Tylenol 3, and he was advised that  
28 morphine could also cause a rash since he had a reaction with codeine, which is an ingredient in  
Tylenol 3. ECF No. 52-11 at 2. Regardless, since plaintiff agrees that the symptoms were caused  
by NSAIDs and defendant prescribed him different medication upon reporting side effects, the  
discrepancy does not appear material.



1 DSUF ¶¶ 27-30.

2 E. Discussion

3 i. Deliberate Indifference

4 a. Legal Standard

5 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate  
6 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091,  
7 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This requires plaintiff  
8 to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition  
9 could result in further significant injury or the unnecessary and wanton infliction of pain,’” and  
10 (2) “the defendant’s response to the need was deliberately indifferent.” Id. (some internal  
11 quotation marks omitted) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992)).  
12 A plaintiff can establish deliberate indifference “by showing (a) a purposeful act or failure to  
13 respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.”  
14 Id. (citing McGuckin, 974 F.2d at 1060). Examples of a serious medical need include “[t]he  
15 existence of an injury that a reasonable doctor or patient would find important and worthy of  
16 comment or treatment; the presence of a medical condition that significantly affects an  
17 individual’s daily activities; or the existence of chronic and substantial pain.” McGuckin, 974  
18 F.2d at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990); Hunt v.  
19 Dental Dep’t, 865 F.2d 198, 200-01 (9th Cir. 1989)), overruled on other grounds by WMX  
20 Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

21 “While poor medical treatment will at a certain point rise to the level of constitutional  
22 violation, mere malpractice, or even gross negligence, does not suffice.” Wood, 900 F.2d at  
23 1334. Even civil recklessness (failure to act in the face of an unjustifiably high risk of harm  
24 which is so obvious that it should be known) is insufficient to establish an Eighth Amendment  
25 violation. Farmer v. Brennan, 511 U.S. 825, 837 & n.5 (1994). It is not enough that a reasonable  
26 person would have known of the risk or that a defendant should have known of the risk. Id. at  
27 843 n.8. Rather, deliberate indifference is established only where the defendant subjectively  
28 “knows of and disregards an excessive risk to inmate health or safety.” Id. at 837.

1 A difference of opinion between an inmate and prison medical personnel—or between  
 2 medical professionals—regarding the appropriate course of treatment does not by itself amount to  
 3 deliberate indifference to serious medical needs. Toguchi v. Chung, 391 F.3d 1051, 1058 (9th  
 4 Cir. 2004) (citation omitted); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989) (citations  
 5 omitted). To establish that a difference of opinion rises to the level of deliberate indifference,  
 6 plaintiff “must show that the chosen course of treatment ‘was medically unacceptable under the  
 7 circumstances,’ and was chosen ‘in conscious disregard of an excessive risk to [the prisoner’s]  
 8 health.’” Toguchi, 391 F.3d at 1058 (alteration in original) (quoting Jackson v. McIntosh, 90  
 9 F.3d 330, 332 (9th Cir. 1996)).

10 b. Analysis

11 In support of her motion for summary judgment, defendant has submitted the declaration  
 12 of Dr. Nickles and incorporated the declaration into her statement of facts. ECF No. 52-24;  
 13 DSUF ¶ 31. Dr. Nickles opines that defendant acted in compliance with the standard of medical  
 14 care for her evaluation, treatment, and pain management of plaintiff. DSUF ¶ 31. He states that  
 15 defendant saw plaintiff in a timely fashion, ordered the appropriate diagnostic study, and made  
 16 the appropriate referral to a hand specialist. ECF No. 52-24 at 3, ¶ 6. Though plaintiff continued  
 17 to complain of finger deformity and limited range of motion after the surgery, Dr. Nickles opines  
 18 that while plaintiff believes he experienced a poor surgical outcome, that outcome was not caused  
 19 by any treatment or lack of treatment by defendant. ECF No. 52-24 at 3, ¶ 6.

20 In opposition to the motion, plaintiff argues that defendant was deliberately indifferent  
 21 because she did not take his injury seriously and failed to prescribe him with any pain medication  
 22 until he was prescribed morphine on October 25, 2021. ECF No. 57 at 4-5. Plaintiff states that  
 23 his injury was obvious due to swelling and the inability to flex the injured finger, and that  
 24 defendant only prescribed morphine after Dr. Dowback’s October 20, 2021 evaluation which  
 25 “pulled back the curtain on defendant’s wrongdoing.” Id. at 5, 7. He asks why defendant would  
 26 prescribe morphine—“the strongest painkiller known”—after previously recommending only  
 27 NSAIDs and concludes that it “was solely an attempt at damage control.” Id. at 5. However, the  
 28 medical records clearly reflect that plaintiff was already prescribed pain medication at the time he

1 saw defendant, and plaintiff has not established that he is competent to offer any opinions as to  
2 whether defendant's initial NSAID recommendation was inappropriate, nor does he cite to any  
3 evidence to support this claim. Moreover, it is undisputed that after plaintiff informed defendant  
4 that he experienced a rash and constipation from taking the recommended NSAIDs defendant  
5 prescribed him with morphine, indicating that she was not ignoring his condition.<sup>6</sup> Finally,  
6 plaintiff provides no evidence regarding the relative strength of the dosage he was provided to  
7 support his claim that the switch from NSAIDs to morphine was nothing more than "damage  
8 control" and the inference that the original pain medication was therefore inappropriate.  
9 Plaintiff's arguments regarding defendant's medication recommendations and prescriptions are  
10 based on speculation and his unqualified opinion and are not sufficient to create a material dispute  
11 of fact.

12 Plaintiff also argues that defendant's deliberate indifference is demonstrated by the length  
13 of time it took for him to receive surgery after the initial injury. ECF No. 57 at 4, 6. He argues  
14 that "a joint injury, if not treated promptly and effectively, WILL result in permanent disability of  
15 that joint and its associated member" and that "delayed surgery would result in permanent  
16 disability." Id. at 4. He further argues that the delay in surgery caused him permanent damage  
17 and emphasizes that from the date of his injury it took over two months to undergo the necessary  
18 surgery. Id. at 3-4, 6. In an effort to support these arguments, plaintiff points to the initial  
19 referral to Dr. Dowback being categorized as a "medium priority" as evidence that defendant  
20 delayed the specialist examination by a month and caused him to experience continued unabated  
21 pain. Id. at 2. He also claims that Dr. Dowback directed defendant to schedule his hand surgery  
22 within a week of the October 20, 2021 consultation and informed him that since it had taken so  
23 long from his initial injury to the time of surgery, he could lose mobility in his right middle  
24 finger. Id. at 3. However, these claims are unsupported by the record.

25 With respect to scheduling, plaintiff does not present evidence that defendant's  
26 prioritization of his initial evaluation was medically inappropriate or that defendant had control

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27 <sup>6</sup> There is also some indication that he was prescribed morphine because he had a similar reaction  
28 to Tylenol 3.

1 over scheduling and deliberately pushed out plaintiff's appointment. In contrast, the evidence  
2 shows that when plaintiff came to defendant with complaints of continued pain, she called the  
3 specialist to see if an earlier appointment was available. DSUF ¶ 15. As for scheduling of the  
4 surgery, plaintiff's medical records reflect that Dr. Dowback ordered blood tests and an  
5 electrocardiogram and requested they be completed within the week, and defendant ordered the  
6 requested tests. ECF No. 52-11 at 2 ("We will need a CBC CMP PT PTT INR EKG. Would like  
7 to do this within the next week."); ECF No. 52-12 at 2-3 (ordering tests). There is no indication  
8 that he ordered surgery to be scheduled within the week. ECF No. 52-11 at 3 (follow up  
9 instructions stating "[p]lan surgery on specific date"). Finally, plaintiff argues that the delay in  
10 surgery was harmful, but he is not competent to make such an evaluation. Plaintiff's own account  
11 of an alleged statement by Dr. Dowback is inadmissible hearsay; it is neither reflected in or  
12 otherwise supported by the medical records authored by Dowback.

13 Plaintiff has failed to establish that he is competent to provide expert opinions on the  
14 standards and appropriateness of the pain medication prescribed or the timing of his treatment,  
15 including surgery, and he has offered no other evidence supporting his claims. Absent any  
16 competent evidence, plaintiff's arguments amount to nothing more than a difference of opinion  
17 that cannot support a claim of deliberate indifference. Toguchi, 391 F.3d at 1058. For these  
18 reasons, plaintiff has failed to establish a dispute of fact regarding defendant's treatment plan that  
19 would indicate that defendant was deliberately indifferent to his medical needs and defendant's  
20 motion for summary judgment should be granted.

21 c. Qualified Immunity

22 "[G]overnment officials performing discretionary functions generally are shielded from  
23 liability for civil damages insofar as their conduct does not violate clearly established statutory or  
24 constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457  
25 U.S. 800, 818 (1982) (citations omitted). In analyzing a qualified immunity defense, the court  
26 must consider the following: (1) whether the alleged facts, taken in the light most favorable to the  
27 plaintiff, demonstrate that defendant's conduct violated a statutory or constitutional right; and (2)  
28 whether the right at issue was clearly established at the time of the incident. Saucier v. Katz, 533

1 U.S. 194, 201 (2001), overruled in part by Pearson v. Callahan, 555 U.S. 223, 236 (2009)  
 2 (overruling Saucier’s requirement that the two prongs be decided sequentially). Since the facts  
 3 taken in the light most favorable to plaintiff do not show the violation of a constitutional right, it  
 4 is not necessary for the court to address defendant’s qualified immunity argument and the court  
 5 declines to do so.

6 ii. Professional Negligence Claim

7 Subject to the conditions set forth in 28 U.S.C. § 1367(c), district courts may decline to  
 8 exercise supplemental jurisdiction over state law claims. Acri v. Varian Assocs., Inc., 114 F.3d  
 9 999, 1000 (9th Cir. 1997) (en banc). The court’s decision whether to exercise supplemental  
 10 jurisdiction should be informed by “values of economy, convenience, fairness, and comity.” Id.  
 11 at 1001 (citations and internal quotation marks omitted). Further, primary responsibility for  
 12 developing and applying state law rests with the state courts. Therefore, when federal claims are  
 13 eliminated before trial, district courts should usually decline to exercise supplemental jurisdiction.  
 14 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 & n.7 (1988) (citation omitted); Gini v. Las  
 15 Vegas Metro. Police Dep’t, 40 F.3d 1041, 1046 (9th Cir. 1994) (“[I]n the *usual* case in which  
 16 federal-law claims are eliminated before trial, the balance of factors . . . will point toward  
 17 declining to exercise jurisdiction over the remaining state law claims.” (alteration in original)  
 18 (quoting Schneider v. TRW, Inc., 938 F.2d 986, 993 (9th Cir. 1991))). As outlined above, it is  
 19 recommended that defendant’s motion for summary judgment be granted as to the federal law  
 20 claim and the undersigned therefore recommends that the court decline to exercise supplemental  
 21 jurisdiction over plaintiff’s state law claims.

22 V. Plain Language Summary of this Order for a Pro Se Litigant

23 It is being recommended that your motion for summary judgment be denied because it is  
 24 not properly supported with evidence. It is also being recommended that defendant’s motion for  
 25 summary judgment be granted and this case be dismissed because there is no evidence that shows  
 26 that the care and treatment provided by defendant was medically unacceptable and constituted  
 27 deliberate indifference to your medical needs. Because it is being recommended that your Eighth  
 28 Amendment claim be dismissed, it is also being recommended that the court decline to address

the state professional negligence claim.


CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Plaintiff's cross motion for summary judgment (ECF No. 57) be DENIED;
2. Defendant's motion for summary judgment (ECF No. 52) be GRANTED; and
3. Judgment be entered in favor of defendant.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 22, 2025

  
ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE